

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants : MICHAEL C. JONES Confirmation No.: 6924
Serial No. : 10/671820
Filed : 09/26/2003
Title : RADIAL IMPACTION BONE TAMP & ASSOCIATED METHOD

Art Unit : 3733
Examiner : JAMES L. SWIGER, III

I hereby certify that this correspondence is being transmitted via
The Office electronic filing system in accordance with 37 CFR 1.6(a)(4)

February 10, 2010

(Date of Deposit)

Cynthia K. Barnett

(Name of applicant, assignee, or Registered Representative)

/Cynthia K. Barnett/

(Signature)

February 10, 2010

(Date of Signature)

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REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT
UNDER 37 C.F.R. 1.705(b) WITHIN THREE MONTHS OF RECEIPT OF THE
NOTICE OF ALLOWANCE

Dear Sir:

Responsive to the Determination of Patent Term Adjustment posted on the Patent Application Information Retrieval System (PAIR) and provided with the Notice of Allowance (December 4, 2009), and in light of the recent ruling in *Wyeth v. Dudas*, No. 2009-1120, slip op. (Court of Appeals for the Federal Circuit) the Applicants submit this Request for Reconsideration of Patent Term Adjustment under 37 C.F.R. 1.705. As stated in 37 C.F.R. 1.705(b):

Any request for reconsideration of the patent term adjustment indicated in the notice of allowance, except as provided in paragraph (d) of this section, and any request for reinstatement of all or part of the term reduced pursuant to § 1.704(b) must be by way of an application for patent term adjustment. An application for patent term adjustment under this section must be filed no later than the payment of the issue fee but may not be filed earlier than the date of mailing of the notice of allowance.

This request is being submitted before payment of the issue fee (due March 4, 2010), and complies with the relevant deadline specified in 37 C.F.R. 1.705. Thus, Applicants contend this request is timely.

Applicants submit that, due to an incorrect PTA calculation under 37 C.F.R. 1.1702(a) and the recent *Wyeth* decision, the correct Patent Term Adjustment should be at least an additional 122 days. The final number is dependent on when the patent issues in the captioned application. Applicants, therefore, request that the allowed application be granted an additional patent term of 122 days plus any additional days should the USPTO take longer than four months to issue the patent.

1. USPTO “A Delay” Calculation

Applicants agree with the USPTO’s initial determination, which, for purposes of this request and in keeping with the explanation provided in *Wyeth*, Applicants will refer to as the “A delay.” In the “A delay” the Patent Office delayed prosecution by issuing the first communication 14 months plus 453 days after the filing of the application (37 CFR 1.703(a)(1)). In addition, the Patent Office delayed responding to the Response which was filed on 7/15/2009 by an additional 19 days.

These delays result in an “A delay” patent term adjustment of 472 days ($453 + 19 = 472$).

2. “B Delay” Calculation Must be Added to the “A Delay” Calculation

This application has yet to issue as a U.S. Patent and an RCE was filed on January 30, 2007, ending the “B” time. The Patent Office however has **not** included in the Patent Term Adjustment the days related to the “B delay,” which are the days delay resulting from an application pending longer than three years. According to 37 C.F.R. 1.703(b):

The period of adjustment under § 1.702(b) is the number of days, if any, in the period beginning on the day after the date that is three years after the date on which the application was filed under 35 U.S.C. 111(a) or the national stage commenced under 35 U.S.C. 371(b) or (f) in an international application and ending on the date a patent was issued...

The instant application was filed on March 14, 2005 and is still pending. The *Wyeth* decision states that “the ‘A period’ and ‘B period’ overlap only if they occur on the same calendar day or days” (*Wyeth*, No. 07-1492, slip op. at 8).

Thus, according to the *Wyeth* decision, Applicants are entitled to both the “A delay” of 472 days (beginning on 9/26/2003 and ending on 2/22/2006 plus the additional 19 days discussed above) and the “B delay” of at least 125 days (beginning on 9/26/2006 to 1/30/2007 plus any delay in the issuance of the patent) minus any overlap which occurs on the same calendar days, and minus any Applicant delay (3 days).

According to the PAIR information, and the above dates, provided that the patent issues within four months of the payment of the issue fee, there is no overlap of calendar days between the “A delay” (472 days) and the “B delay” (at least 125 days). Thus, the total Patent Term Adjustment due to both the “A” and “B” delays and minus any Applicant delay is at least 594 days ($472 + 125 - 3 = 594$) as of the submission date of this Petition.

For these reasons, the Patent Term Adjustment for this case should be at least 594 days.

Any patent issuing from the captioned application will not be subject to a terminal disclaimer.

In light of the foregoing, the Applicants respectfully request that the patent term adjustment be at least 594 days. If a telephone conference would expedite the prosecution of this Request for Reconsideration of Patent Term Adjustment, please contact the undersigned agent as indicated below.

Respectfully submitted,

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